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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

Preemption of State and Local Zoning and )  
Land Use Restrictions on the Siting, )  
Placement and Construction of Broadcast )  
Station Transmission Facilities )

MM Docket No. 97-182

To: The Commission

**COMMENTS OF WFTC(TV), MINNEAPOLIS, MINNESOTA**

WFTC(TV) (FOX, Channel 29), Minneapolis, Minnesota, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding. FCC 97-296, released August 19, 1997.

**I. Summary**

WFTC currently operates from a tower it shares with KMSP-TV (Channel 9, UPN) at the Shoreview antenna farm northeast of Minneapolis. The market's NBC, ABC, CBS, HSN, UPN and WB affiliates all broadcast from Shoreview. Due to unique circumstances, the Commission has acknowledged that the Shoreview site is the only feasible location for tall towers in the market and imposed conditions on the licenses of certain television licensees occupying the

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site which require them to make antenna space available to other television broadcasters on a fair and equitable basis.<sup>1</sup>

WFTC believes that broad preemption rules are not necessary to encourage the prompt deployment of digital television ("DTV") service in its market. Rather, WFTC urges the Commission to modify and enforce its Unique Site Rule, 47 C.F.R. Section 73.635, to accomplish this objective. To make the Rule more effective, the Commission should expand it to apply at all times, not just in connection with an application for license or a renewal. The Commission should also make clear that it will not hesitate to employ the Rule in the digital context under circumstances such as those present at Shoreview.

## **II. Background**

In 1968, the Commission's Review Board held that the Shoreview antenna farm was a unique site. In so doing, it imposed conditions upon the authorizations of television licensees relocating to that site which required them to accommodate other television licensees in the market, such as WFTC, on a fair and equitable basis.<sup>2</sup>

The Board found that a plethora of circumstances justified this result. First, six airports surround the area and impose significant air safety constraints. Second, in

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<sup>1</sup> WTCN Television, Inc., 14 FCC 2d 870, 893 (1968). The condition was imposed on WTCN Television, Inc., licensee of WTCN-TV, Minneapolis, Minnesota; Midwest Radio-Television, Inc., licensee of WCCO-TV, Minneapolis, Minnesota; United Television, Inc., licensee of KMSP-TV, Minneapolis, Minnesota; and Twin City Area Educational Television Corporation, licensee of KTCA-TV and KTCI-TV, St. Paul, Minnesota.

<sup>2</sup> See id.

1961, the FAA and the Minnesota State Department of Aeronautics recommended to two television licensees that Shoreview be used as an antenna farm for all Twin City television stations.<sup>3</sup> Third, the Board rejected contentions from an opposing party that land was available or zoning approval could be secured for an alternative site.<sup>4</sup> It proceeded to grant the applications on the condition that:

the antenna structures be made available for use by present and future permittees and licensees of television facilities in the Minneapolis-St. Paul areas who have already made requests or who make requests therefor on a fair and equitable basis and on the further condition that within 60 days after release of this decision the applicants file with the Commission the terms and conditions under which the proposed structure will be made available to such potential users.<sup>5</sup>

The condition attached to the authorization granted to one of the parties, United Television, Inc. (licensee of KMSP-TV), was temporarily deleted in 1972,<sup>6</sup> but re-imposed in 1975 based upon a showing by Viking Television, Inc., permittee of KTMA-TV, channel 23, that local government restrictions precluded its plans to construct a separate tower outside of the Shoreview facility.<sup>7</sup>

Despite the existence of the condition, however, access to space at Shoreview has remained a problem for many years for predecessors to WFTC, and the permittees of other UHF facilities in the market. Permittees of two UHF facilities, channels 23 and

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<sup>3</sup> See id. at 885.

<sup>4</sup> See id.

<sup>5</sup> Id. at 893 (citing 47 C.F.R. § 73.635).

<sup>6</sup> United Television, Inc., 38 FCC 2d 655 (1972).

<sup>7</sup> United Television, Inc., 54 FCC 2d 291 (1975).

29, were unable to obtain access to the site until 1981. Frustrated that all other efforts to obtain access had failed, a WFTC predecessor and the channel 23 permittee opposed a United application which sought approval for a transfer of ownership of its parent corporation.<sup>8</sup> Lease negotiations commenced immediately thereafter.<sup>9</sup>

More recently, in 1989, the Shoreview facility condition again became an issue when Nationwide Communications, Inc. ("Nationwide"), the immediate predecessor licensee of WFTC(TV), sought to upgrade its Shoreview transmission plant.<sup>10</sup> Nationwide was unsuccessful in obtaining United's consent to the upgrade and resorted to seeking redress in the local courts and before the Commission. It asked the Commission to require United to file an early renewal so that the agency could ascertain whether United's refusal to permit Nationwide to modify its facilities violated the access condition imposed by the Commission in WTCN Television, Inc., 14 FCC 2d 870 (1968).<sup>11</sup> The litigation was settled before the Commission resolved the issues raised by Nationwide's pleadings.

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<sup>8</sup> See Consolidated Supplement to Petition to Institute Early Renewal Proceeding, Petition to Deny and Informal Objection to Renewals of Nationwide Communications Inc., at 6-7 (filed August 30, 1989).

<sup>9</sup> See id.

<sup>10</sup> Nationwide sought to replace its 6 1/8 inch transmission line with an 8 3/16 inch line and United objected on the ground that the modification would substantially increase wind load on United's tower. Id.

<sup>11</sup> See Petition to Institute Early Renewal Proceeding, Nov. 23, 1988; Informal Objection to Renewals and Request for Deferral of Consideration, Nov. 22, 1988; Petition to Deny, Nov. 23, 1988.

### **III. The Current Situation**

Since the Commission first imposed conditional licenses in 1968 because of the unique scarcity of tower space, the problem has been exacerbated by increases in aviation traffic, population, and strict local zoning ordinances. With respect to the aeronautical issues, the market remains highly constrained by airports and air traffic. An airspace consultant recently conducted an aeronautical evaluation to identify any areas in which WFTC could locate a DTV tower and place an adequate signal over its current coverage area. The color coded chart produced to display the result of that evaluation, attached as Exhibit A, graphically demonstrates the severity of the aeronautical-related restrictions in the Minneapolis-St. Paul area by showing that WFTC could build a tower on only a minute portion of land and still comply with FAA restrictions.

As the map makes clear, very few areas are available for tower construction. On the map, the blue area represents potential visual flight rules (VFR) routes, in which no towers can be built over 500 feet. The pink areas indicate take-off and landing flight paths, which also severely restrict tower construction. The orange areas indicate places that are both potential VFR routes and take-off and landing areas. No towers capable of supporting DTV service could be located in any of these areas.

Additionally, local laws restrict or prohibit the placement of broadcast towers in several areas in which WFTC would be interested in constructing a DTV facility. For example, according to the Town Code for Columbus Township, which is in close

proximity to the Shoreview site, "[a]ll proposed towers shall not exceed 150 feet in height."<sup>12</sup> Similarly, Section 20.045 of the city ordinance of Vadnais Heights, a town located just a few miles from the current Shoreview antenna site, allows telecommunications antennas to be placed only on City water towers and within industrial districts under special circumstances, but prohibits the placement of antennas within commercial and residential districts. Recently, the Vadnais Heights City Council rejected a request by U.S. West Wireless to erect a 75 foot PCS tower at a local industrial court, holding that Section 20.045 does not allow for the construction of a freestanding tower. These regulations are merely illustrative of the continuing impediments to the construction of broadcast towers in the market.

#### **IV. The Unique Site Rule Should Be Expanded to Provide an Effective Remedy for Tower Siting Problems.**

Despite the local obstacles to constructing new broadcast towers, WFTC believes that an industry-oriented approach is the best method to achieve the Commission's goal of making digital television a reality. The Commission should provide broadcasters with the tools to negotiate a mutually-beneficial solution that avoids Commission oversight of local regulation. Specifically, Twin-Cities area television broadcasters should cooperate to construct new common DTV towers on available land at the Shoreview site. To promote this result, and to ensure that some stations are not effectively precluded from commencing a viable DTV service, WFTC

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<sup>12</sup> See Chapter 7, Section 7A-834(6), Regulations for the Location, Construction and Use of Communications Towers and Antenna.

urges the Commission to enhance and expand the Unique Site Rule. 47 C.F.R.

§73.635.

As noted above, WFTC broadcasts from the KMSP-TV tower at Shoreview, but that tower cannot support WFTC's DTV operations. In fact, it is unclear whether it will support KMSP-TV's own DTV station. Moreover, there appears to be no space on the other already existing Shoreview towers upon which WFTC could locate its DTV equipment. However, within Shoreview there are two parcels of land which the City of Shoreview has zoned for broadcast towers. Both parcels are owned by in-market broadcasters.<sup>13</sup> WFTC believes that construction of a common tower to accommodate DTV services is the only feasible means to ensure all area stations can deliver digital service.

As the contentious tower siting proceedings of the past indicate, negotiating and effectuating tower lease agreements can be difficult.

Strengthening the Unique Site Rule would facilitate that process. Section 73.635 of the Commission's Rules states:

No television license or renewal of a television license will be granted to any person who owns, leases or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees, and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations.

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<sup>13</sup> See City of Shoreview Conditional Use Permit No. 1152-87-06-01 for Telefarm, Inc., at I; City of Shoreview Conditional Use Permit No. 1152-87-06-02 for United Television, Inc., at I.

As evidenced by the historical and current tower siting situation in the Minneapolis-St. Paul market, the Shoreview site is "peculiarly suitable for television broadcasting" in that market. Additionally, the site does not appear to be available for use by any broadcaster other than those with towers already located in the area. The need to accommodate the construction of numerous DTV systems will further exacerbate this problem. Further, the aeronautical and zoning considerations in the market make it apparent that no other comparable site to the Shoreview area is available. Finally, the exclusive use of Shoreview by a few licensees with authorization to construct DTV towers would unduly restrict competition.

Indeed, WFTC needs to continue to operate from the Shoreview area in order to promote the viability of its analog and digital services. For example, relocating to the southeastern portion of the market (even if possible), would result in a significant loss of service to the north and northwestern portions of the current WFTC service area. These areas rely on WFTC as their only source of programming from the Fox network. Additionally, this area includes the counties with the fastest growing populations within the market. The southeastern sections also already receive Fox service from affiliates located in adjacent markets.

Moreover, colocation of DTV facilities would promote competition and the prompt introduction of service. For example, viewers are likely to receive digital service from off-the-air antennas, which would likely be oriented toward the Shoreview site. If WFTC were required to operate anywhere not within close proximity of Shoreview, its DTV service would not enjoy the same high quality service as other providers in the market. Also, negotiation of an agreement for the location of DTV towers on the Shoreview site



would promote the timely introduction of DTV services to the Minneapolis-St. Paul market, the 14<sup>th</sup> largest Designated Market Area in the country. Under the aggressive DTV construction schedule implemented by the Commission, the major network affiliates in markets 11 to 30 must commence DTV service by November 1, 1999.<sup>14</sup> Accordingly, development of a common antenna site will be necessary to ensure that the Commission's goals of introducing a new viable digital service can become a reality in the Twin Cities.

In light of the paramount public interest in prompt deployment of DTV services, the Commission should expand the Unique Site Rule to allow a broadcaster to file a complaint under that Rule *at any time* in the event that market competitors use their control of a unique site to prevent the initiation of other broadcast services. The Commission has stated that the purpose of the unique site rule is "to remove unnecessary impediments to competition, ensuring that the public will have access to a variety of differing broadcast sources."<sup>15</sup> Only by modifying the Rule, however, can it be effectively used to serve its purpose of removing unnecessary impediments to competition.<sup>16</sup> The Commission will also ensure the timely implementation of DTV while

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<sup>14</sup> See Fifth Report and Order in MM Docket No. 87-268, FCC 97-116 at ¶76, adopted April 22, 1997.

<sup>15</sup> K-W TV, Inc., 70 RR 2d 1655, 1659 (1992).

<sup>16</sup> In 1981 the Commission declined to adopt a request by a broadcaster that the Commission amend Section 73.635 to require that grants of construction permits for new or changed facilities for VHF stations which involve construction or modification of a tower, be conditioned to permit UHF television stations, upon request, to place their antenna on the tower. See Common Use of TV Towers, Report and Order, 49 RR 2d 482, 484 (1981). However, the Commission stated it would address "situations where

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remaining sensitive to the rights of states and localities to protect the legitimate interests of their citizens. Accordingly, WFTC urges the Commission to stimulate cooperation among broadcasters by strengthening the Unique Site Rule so that digital service will not be jeopardized in the Twin Cities.

Respectfully submitted,

WFTC(TV), MINNEAPOLIS, MINNESOTA

By

  
Steve Spendlove

Vice President/General Manager

Dated: October 30, 1997

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the exclusive use of a unique site results in limitations of service to the public." *Id.* at 484. WFTC submits that exclusive use of the Shoreview site by only a few broadcasters for DTV service would severely restrict the availability of a new service, contrary to express Commission policy.

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